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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 152

J. GREENEBAUM TANNING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 626–635) is reported in 110 F. (2d) 984. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 589–611) are reported in 11 N. L. R. B. 300.

JURISDICTION

The decree of the court below (R. 645–647) was entered on April 27, 1940. The petition for writ of certiorari was filed on June 14, 1940. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the Board's findings that petitioner dominated, interfered with, and supported a labor organization of its employees in violation of Section 8 (1) and (2) of the Act and discriminatorily discharged certain of its employees in violation of Section 8 (1) and (3) of the Act.

As stated in the Argument (*infra*, pp. 13–14), we do not think the following Questions 2, 3, 4, and 5 are properly presented in this case.

2. Whether, as a prerequisite to directing the reinstatement of employees, the Board was required to introduce evidence and make findings that the employees had not obtained regular and substantially equivalent employment at the time of the reinstatement order, although no contention that the employees had obtained such employment was made before the Board.

3. If the answer to the second question is in the affirmative, the further question arises whether the power of the Board to award back pay is limited to employees whom it validly orders reinstated, with the result that the back-pay provisions of the Board's order must fall with the reinstatement provisions.

4. Whether the Board, upon findings that an employer has engaged in unfair labor practices, may order the employer to cease and desist generally from such practices, or whether the Board must limit the operation of its order to the particular geographic locality in which the unfair labor practices occurred.

5. Whether the Board may require, as affirmative action appropriate to effectuate the policies of the Act, that an employer pay over to governmental relief agencies sums equal to the amounts disbursed by those agencies for the employment on work-relief projects of employees who would have been at work for the employer except for their discharge in violation of the Act, such sums to be excluded from the back pay ordered paid to the employees.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151, *et seq.*) are set forth in the Appendix to the Petition, except that the quotation of Section 10 (e) (Pet. 47–48) omits the following provision, which is of importance in this case:

> No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

STATEMENT

Upon the usual proceedings had pursuant to Section 10 of the National Labor Relations Act, i. e., amended charge (R. 10–11), complaint (R. 7–10, 12), answer (R. 14–17), hearing before a trial examiner, at which the Rockwell-Warsaw Leather Workers Association, a labor organization alleged in the complaint to be company-dominated, intervened (R. 25), intermediate report of the trial examiner (R. 565–573), exceptions thereto by petitioner and the Association (R. 573–579, 581–583), oral argument (R. 584) and the filing of briefs before the Board (R. 592), the Board issued its findings of fact, conclusions of law and order (R. 589–611). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[1]

For several years prior to May 1937, petitioner maintained a plainly company-dominated Employees Benefit Association, which purported to act as the employees' bargaining representative in addition to paying them sick benefits from a fund made up of sums deducted from the employees' wages and equal sums contributed by petitioner (R. 594; 298–303, 367, 368, 374, 376, 380). In April 1937 National Leather Workers Association, Local No. 43, commenced its efforts to organize petitioner's Chicago plants (R. 593; R. 34).

[1] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

Shortly after this Court sustained the constitutionality of the National Labor Relations Act on April 12, 1937,[2] Friend, an official of the company, summoned Breen, shop chairman of the Benefit Association, and Nunsek, president of that organization, to his office and told them that the employees "would have to form a new one and quit the old one" (R. 595, 601; R. 300–302, 384–385, 380). The Board found that petitioner gave the Association its initial impetus, while carefully planning to clothe it with an appearance of independence, and that petitioner "played a vital part in guiding the course of its organization through its control of the Benefit Association" (R. 601–602). On May 11, 12, and 13, a day or two (R. 384) after the company's advice that a new organization was necessary, Breen and several helpers distributed leaflets among the employees announcing a mass meeting "Concerning the Wagner Law" and promising free beer and sandwiches to those who attended; these leaflets were openly passed out during working hours and were inserted in the workers' time-card racks on the time clocks (R. 595; R. 173, 312–314, 318, 322).

The meeting was held on the evening of May 13; members of Local 43 who sought peaceably to attend and partake in the discussion were evicted by policemen and some of them were arrested (R. 595;

[2] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and companion cases.

R. 274–275, 284–285).[3] Moland, the attorney for the Benefit Association, and another attorney, addressed the employees, informing them that the Benefit Association was illegal and that the men were free to join any labor organization they chose, but suggesting the procedure for organizing an unaffiliated union (R. 595–596, 602; R. 394, 444, 460, Intervenor Exh. 3).[4] The employees voted that the funds of the Benefit Association be retained by its treasurer pending final disposition, but apparently did not discuss whether a successor organization should be established (R. 596; R. 116–117, 304–305, 138, 168, 174–175, 195, 227). But on May 13, apparently prior to the mass meeting, Breen had ordered from a printer application blanks for membership in the "Rockwell-Warsaw Leather Workers Association," which was not yet in existence (R. 596–597, 603; R. 306, 374, 483–484, 486, Bd. Exh. 8).[5]

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[3] Those excluded were not employees of petitioner (R. 274, 284).

[4] In the proceeding before the Board Moland appeared as counsel for the Association (R. 602; R. 20, 25, 583). The Board regarded Moland's activities, and the fact that it was apparently taken for granted that the Benefit Association's attorney would represent its successor, as significant links in the chain of identity between the Association and its admittedly company-dominated predecessor (R. 602).

[5] According to Breen, the name "Rockwell-Warsaw Leather Workers Association" was decided upon by him and an employee named Rounds some 4 days after the mass meeting and he and Rounds first decided to form the Association after the mass meeting (R. 306–308, 372). However, the order for the applications was received by the printer on

During working hours on the days immediately following the mass meeting Breen, an employee named Rounds, and Timekeeper Samp ranged through the plant soliciting the signatures of employees, first on blank sheets of paper, and later on the application blanks when they arrived from the printer (R. 596–597; R. 55–57, 58–59, 118–119, 176–179, 308). The solicitors suffered no loss of pay for the time thus spent (R. 597; R. 317, 313, 495–496) although the solicitation proceeded openly in the presence of petitioner's foremen (R. 597–598; R. 60–61, 121–122, 181–186, 233–234, 236, 313, 315–317, 329, 338, 367, 492–497, 507–508, 516). Breen attributed his immunity from interference to the fact that his position as shop chairman of the Benefit Association entailed similar privileges and "I was still connected with the old association" (R. 597–598, 602; R. 315, 354).

Members of petitioner's supervisory staff participated in the campaign to establish the Association. Timekeeper Samp, one of the most active organizers, told one employee that petitioner's general manager "wants us to get all the boys in" and promised various employees that petitioner would grant a 5-per cent wage increase to those who joined (R. 596, 598–599, 602; R. 60–63, 176–178, 234–235, 247).[6] Both Samp and an assistant

May 13, apparently prior to the mass meeting (R. 596–597; R. 483–484, 486).

[6] Samp's forecast proved correct: petitioner granted a 5 percent wage increase in a contract between it and the Association executed on May 27 (*infra*, pp. 8–9).

foreman threatened employees with discharge unless they signed Association applications (R. 599; R. 236–237, 249). Superintendent Hirsch quoted the general manager as saying that "we all better sign up or we will be without work" and that he did not "want outsiders to get in the plant" (R. 598–599, 602; R. 64, 69–70, 97–98, 488, 316, 491–497). Some 250 signatures were secured the first day (R. 602; R. 317).

An organizing meeting of the Association was announced for May 21 in printed leaflets distributed during working hours (R. 599; R. 123, 324). At this meeting a constitution and bylaws previously drafted by Moland, the attorney for the Benefit Association, were adopted, and officers were nominated and an election scheduled (R. 599–600; R. 302, 361–362, 374–375, Intervenor Exh. 4). The election was held on May 24 in the plants and the results were posted on the time clock (R. 600; R. 94, 124, 326, 329, 401, 403, 426). The results continued control in the officers of the Benefit Association: Breen became shop chairman and three other employees were retained in the offices corresponding to those they had held in the predecessor organization (R. 600; R. 330, 331, 562).

On May 26 the Association presented, and on the following day petitioner executed, a contract providing for recognition of the Association as the exclusive bargaining representative of the employees, a 5-percent wage increase (as previously promised

by Timekeeper Samp, *supra,* p. 7), a closed shop, the checkoff, and machinery for adjustment of grievances (R. 600; R. 541, 346, 404–405, 408). The Board found that petitioner's alacrity in signing the agreement evinced its "eagerness to establish the Association as representative of its employees on a firm contractual basis" (R. 603). The contract was prepared by Moland; neither the members nor all the officers of the Association authorized its drafting or participated in formulating the terms, yielding, so the Board found, a strong inference that they "were merely puppets" in the hands of petitioner (R. 600–601, 603–604, R. 319–320, 339, 340, 342, 344, 403–404). Subsequently the Association acquiesced in petitioner's institution of a 20-percent wage cut (R. 601; R. 445).

The Board found that the expenses involved in launching and establishing the Association were borne either by petitioner or by the company-dominated Benefit Association (R. 603). Supporting this inference are Breen's unsatisfactory, and sometimes palpably false, explanations as to where the money came from, and the unlikelihood that he could afford to defray them himself, as he testified he did (R. 602–603).[7]

On June 25, without authorization by the employees, the funds of the Benefit Association, in-

[7] Breen testified that he paid for the leaflets announcing the mass meeting of May 13 with money borrowed by him from Timekeeper Samp and that he paid from his own pocket the rental of the meeting hall and, apparently, the cost of the refreshments served at that meeting (R. 595;

cluding those contributed by petitioner, were turned over to the Association (R. 601; Intervenor Exh. 4).

At the start of work on May 27, the day after the Association presented the closed-shop contract to petitioner, Breen and two other Association officers informed Wojdyla, Zych, and Froelich, three employees who had not joined the Association, that they were discharged (R. 604–605; R. 73, 187, 238, 412). This was plainly done with petitioner's sanction and approval (R. 604–606; R. 73–74, 488–489, 188–190, 446, 231, 238–239, 443, 385–386, 502–503).[8]

R. 310–311, 121, 153). Breen also testified that he paid the printing bill for the Association application blanks from his own funds (R. 596–597; R. 309). Breen's testimony concerning payment for the leaflets announcing the Association's first meeting on May 21 is plainly false: his testimony is that payment of the printer's bill was deferred and finally made from the first dues collected by the Association; the printer's records, however, show that payment was made on May 19 and 20, prior to the organizing meeting and before any collection of dues (R. 599; R. 324–325, 485–487). There is no indication that the Association repaid Breen for these relatively large expenditures; the Association kept no financial records for the period prior to June 1 and its secretary did not keep his promise, made on the witness stand, to produce vouchers for expenditures which he asserted were made during May (R. 603; 473).

[8] Under the closed-shop provision of the contract, executed on the day of the discharges, the employees were permitted a 3-day period during which to join the Association and the power of discharge was expressly reserved to petitioner (R. 600; R. 545). Petitioner did not contend before the Board that the discharges were proper under the contract but asserted, on the contrary, that they were accomplished in violation of the contract (R. 605–606; note 8, p. 12, *infra*).

Upon the foregoing evidentiary findings, the Board concluded that petitioner dominated and interfered with the Association and contributed financial and other support to it in violation of Section 8 (1) and (2) of the Act (R. 604, 609), that the contract between petitioner and the Association was illegal and void (R. 604), and that petitioner discriminated against Wojdyla, Zych, and Froelich in violation of Section 8 (1) and (3) of the Act (R. 607, 609). The Board ordered petitioner to cease and desist from these unfair labor practices; to cease giving effect to its contract with the Association; to withdraw recognition from and disestablish the Association; to reimburse all employees who were members of the Association for dues deducted from their wages by petitioner pursuant to the check-off provision of the contract; to offer reinstatement with back pay to the three employees discriminated against; to pay over to governmental relief agencies sums equal to the amounts disbursed by those agencies for the employment of the three employees on work relief projects; and to post appropriate notices (R. 609–611).

On June 24, 1939, the Board filed in the court below a petition for enforcement of its order against petitioner (R. 1–4). On March 22, 1940, the court handed down its opinion (R. 626–635) and entered its judgment (R. 636) enforcing the Board's order except for the provision requiring

reimbursement to the employees for Association dues checked off their wages by petitioner. A decree was entered accordingly on April 27, 1940 (R. 645–647).

ARGUMENT

I

Petitioner's contention (Pet. 15–32) that the Board's findings of unfair labor practices are not supported by substantial evidence presents no question of general importance. Compare *National Labor Relations Board* v. *Waterman S. S. Co.*, 309 U. S. 206, 208. Further, the evidence, summarized in the Statement (*supra*, pp. 4–10), affords full support for the findings attacked by petitioner and for the action of the court below in sustaining them.[9] Petitioner's further conten-

[9] Petitioner asserts (Pet. 28–29) that the court below erred in stating (R. 630–631) that petitioner "does not contend" that the discharges of the three employees were justified under the closed-shop contract between petitioner and the Association (R. 630–631). Petitioner did urge that contention in the court below, but it was not properly before the court because petitioner had not raised it before the Board. That is doubtless what the court below intended to convey; its references (R. 631) to petitioner's answer to the complaint and to its brief before the Board so indicate. In its answer petitioner did not mention the closed-shop contract, but denied that it had discharged the employees and alleged that they had voluntarily quit their employment (R. 16). In its exceptions to the intermediate report, petitioner repeated this defense and added that the Association's threats to have the employees discharged were

tion (Pet. 30–31), that in holding that the Board's findings have the requisite support the decision below is in conflict with many other decisions, including those of the court below, is advanced without discussion of the evidence in those cases; since those decisions turned upon their own particular facts they present no conflict.

II

Petitioner also contends: (a) that the order of the Board to reinstate the three discharged employees is not supported by any finding or evidence that the employees had not obtained other regular and substantially equivalent employment when the Board issued its order, and that the court below should, therefore, have remanded the case to the Board for a determination of this question, instead of enforcing the reinstatement order (Pet. 32–36); (b) that under the Act only employees who are validly

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made in violation of the contract between petitioner and the Association, and that petitioner could not be held responsible for the unauthorized actions of the Association's officers (R. 577). The brief filed with the Board by petitioner did not expand these contentions. Consequently, the statement in petitioner's brief in the court below that petitioner's "position always has been" that the discharges were required by the contract (Pet. 28) was untrue. And since no objection not raised before the Board could be considered by the court below without a showing that the failure to urge such objection was excused because of extraordinary circumstances (Section 10 (e)), the change of position in petitioner's brief below (Pet. 28) could not serve to enlarge the contentions before the court.

directed to be reinstated can be awarded back pay, and that the back-pay order therefore falls with the reinstatement order (Pet. 36–38); and (c) that the cease-and-desist order against petitioner should have been limited in its scope to petitioner's Chicago plants, instead of running against petitioner generally, without geographical limitation (Pet. 40–43). These questions, we submit, are not before the Court. They were not urged before the Board (Section 10 (e) of the Act; compare *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. (2d) 652, 662 (C. C. A. 9th), and were not raised in the court below when the validity of the Board's order was at issue.[10]

Further, each of the contentions is devoid of merit and, even if the decision below is taken as passing upon it, presents no question worthy of review.

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[10] Neither in its answer to the petition for enforcement (R. 5), nor in its brief (see note 14, p. 20, *infra*) or oral argument in the court below, did petitioner rely upon any of these contentions. They were first raised after the court had rendered its opinion (R. 626–635) and entered its judgment (R. 636) enforcing the Board's order. Petitioner then filed "Objections to the Entry of any Decree at this Time" (R. 639–641) which contained a variety of contentions, not previously advanced, which went to the validity of the Board's order. The order of the court overruling these "Objections" (R. 644) was entered before the Board could submit an answer to them, and the order specified no ground. It may not be presumed that the court considered upon their merits contentions first raised after judgment and at a time when the validity of the Board's order was no longer in issue before the court (compare note 15, p. 21, *infra*).

(a) Enforcement of the reinstatement order in the absence of a finding or evidence that the discharged employees had not obtained regular and substantially equivalent employment [11] is not in conflict, as petitioner asserts (Pet. 33–34, 36), with *Mooresville Cotton Mills* v. *National Labor Relations Board,* 94 F. (2d) 61, 97 F. (2d) 959 (C. C. A. 4th), and *National Labor Relations Board* v. *Carlisle Lumber Co.,* 99 F. (2d) 533 (C. C. A. 9th), certiorari denied, 306 U. S. 646. In each of those cases the obtaining of substantially equivalent employment was raised before the Board as a ground for denying the usual reinstatement remedy, evidence was adduced relative to that defense, the Board found that the employees in question did not obtain such employment, and the court enforced the order. Neither case held, and there is no decision holding, that where no contention concerning subsequent employment is raised before the Board, the Board must adduce evidence and make specific findings that the men reinstated did not obtain equivalent employment. The statement quoted

[11] Section 10 (c) of the Act authorizes the Board to direct such affirmative relief, "including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." Section 2 (3) of the Act defines "employee" to "include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *."

(Pet. 33–34) from the *Carlisle* case, that before the Board could make a reinstatement order "it would first have to determine whether or not the men were 'employees' at the time of its order", has reference to a substantive requirement where the issue of substantially equivalent employment has been raised; it is not intended to prescribe a procedural prerequisite for every reinstatement order. That is plain from the context of the statement and also from the subsequent decision of the Ninth Circuit in *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. (2d) 652, squarely rejecting the contention here made by petitioner. The court there said (p. 662):

> We agree that only those who are "employees" within the Act definition at the time of the making of the Board's order may be ordered reinstated. *National Labor Relations Board* v. *Carlisle Lumber Co.*, 9 Cir., 1938, 99 F. 2d 533, 537. But that is not to say that an order to reinstate "employees" unaccompanied by specific finding that they have not gained substantially equivalent employment is for that reason invalid. *National Labor Relations Board* v. *Carlisle Lumber Co.*, supra, 99 F. 2d at page 542. Such finding, though helpful to the court, is not essential to validity of the order.
>
> In the present case the Board has ordered reinstated 56 named individuals who are designated as "employees." Since the Board can only order individuals defined by

> the Act as "employees" to be reinstated, an order directing reinstatement of "employees" must be understood, in the absence of a contrary finding, as applicable only to those who are such within the Act's definition.[12] * * *

(b) Since petitioner's attack on the reinstatement order fails, the question whether under the Act only employees who are validly reinstated can be awarded back pay does not arise in this case. Further, no decision supports petitioner's contention; the quoted (Pet. 37) statement from the opinion of Judge Haney in the *Carlisle* case is but dictum, since, as pointed out *supra*, p. 15, the court in that case enforced the reinstatement and back pay provisions of the Board's order. It was, moreover, but the dictum of a single judge. Judge Stephens, concurring, stated that the question was not before the court and that no opinion concerning it should be expressed (99 F. (2d) at 543); Judge Wilbur concurred in the result only (99 F. (2d) at 544). The holdings on the point are contrary to petitioner's contention. *Mooresville Cotton Mills* v. *National Labor Relations Board*, 94 F. (2d) 61 (C. C. A. 4th); *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472 (C. C. A. 3d), certiorari granted limited to another point, No. 14, this Term.

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[12] Here also the Board referred to the men reinstated as "employees" (R. 608, 610).

(c) The cease and desist order, as issued by the Board, is expressly authorized by the Act; Section 10 (c) directs the Board to issue an order requiring the "person" proceeded against "to cease and desist from such unfair labor practices". The limitation in Section 10 (c) is thus one of person only, not of geography. And in requiring the Board to issue an order directing the offending employer to cease and desist from the unfair labor practices found, Section 10 (c) refers to types of unfair labor practices, that is, the types enumerated in Section 8, not to the particular acts or methods constituting the violations found. *National Labor Relations Board* v. *National Motor Bearing Co.,* 105 F. (2d) 652, 660–661 (C. C. A. 9th); cf. *National Labor Relations Board* v. *Pure Oil Co.,* 103 F. (2d) 497 (C. C. A. 5th).

The statutory requirement of a cease and desist order directed to the employer proceeded against cannot be avoided by an asserted prospect (Pet. 42) of future contempt proceedings based upon acts unrelated to the original misconduct, or otherwise forecast by petitioner not to be within the proper scope of the decree. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 552, 567, 568, 571; cf. *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515, 543–544. The cease and desist order in this case is in the form which has been invariably employed by the Board and approved without question by this Court and

by the circuit courts of appeals, including many cases where but one of several plants operated by the same employer was involved, E. g., *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1.

The point was specifically passed upon in *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, 304 U. S. 576, 585. There the Board found violations of Section 8 (2) with respect to labor organizations at two of the company's plants and issued a general order requiring the company to cease and desist from dominating, interfering with, or supporting "any labor organization of its employees" (94 F. (2d) 874). The court disapproved the Board's findings as to one of the unions and set aside the withdrawal of recognition provision as to it, but inforced without modification the general cease and desist order. The court said (p. 869):

> One instance is enough to justify an injunction, which does not specifically comprise both company unions.

III

Finally, petitioner asserts (Pet. 38–40) that the decree below, insofar as it enforces the provision (R. 610) of the Board's order which requires petitioner to pay over to governmental relief agencies sums equal to the amounts disbursed by

those agencies for the employment on work relief projects of the three employees discriminatorily discharged by petitioner, is in conflict with *National Labor Relations Board* v. *Leviton Mfg. Co.*, 111 F. (2d) 619 (C. C. A. 2d), and *National Labor Relations Board* v. *Tovrea Packing Co.*, 111 F. (2d) 626 (C. C. A. 9th).[13] In the cited cases similar work relief agency provisions were disapproved and denied enforcement, and in *Republic Steel Corp.* v. *National Labor Relations Board*, No. 14, this Term, this Court granted certiorari, limited to the work relief agency question. Here, however, as in the case of the other points considered above, petitioner raised no question concerning the "work relief" provision when the validity of the Board's order was under consideration by the court below, but first advanced the contentions in its "Objections" filed after entry of judgment (R. 640–641).[14] We do not, therefore, consider the decision below to

[13] The assertion that the Circuit Court of Appeals for the Fifth Circuit set aside the "work relief" provision in *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. (2d) 474, is error, doubtless inadvertent. No such provision was included in the Board's order in that case.

[14] In the brief filed by petitioner in the court below, petitioner opposed enforcement of the cease and desist provisions of the Board's order on the ground that the Board's findings were not supported by substantial evidence, and, with respect to the affirmative provisions, argued that—

"In any event, even if (contrary to the fact) there had been evidence supporting the Board's ultimate findings that

be an adjudication upon the validity of the "work relief" provision.[15]

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the respondent did violate Sections 8 (2) and 8 (3) of the Act, the order of the Board insofar as it requires (a) the disestablishment of the Association; (b) the reimbursement of employees for dues 'checked off' to the Association; and (c) the posting of the notice in the form ordered by the Board, is nevertheless invalid, improper, and without authority under the Act."

The brief then discussed each of the three affirmative provisions which petitioner was challenging. Brief for Respondent, No. 6998, Oct. Term, 1939, Circuit Court of Appeals for the Seventh Circuit, pp. 51–63.

[15] Prior to their decisions in the *Leviton* and *Tovrea* cases, both the Second and the Ninth Circuits enforced the "work relief" provision in cases where its validity was not challenged. *National Labor Relations Board* v. *National Casket Co.*, 107 F. (2d) 992 (C. C. A. 2d) (see 12 N. L. R. B., at 175–176); *North Whittier Heights Citrus Association* v. *National Labor Relations Board*, 109 F. (2d) 76 (C. C. A. 9th), certiorari denied, No. 853, last Term (see 10 N. L. R. B., at 1297–1298). In the *National Casket* case the court said, "The validity of this provision has not been argued, and we express no opinion on the point" (107 F. (2d) 998). The normal practice of the circuit courts of appeals is to enforce provisions of Board orders which are not challenged, although their validity would be a question of first impression if raised. See e. g., *National Labor Relations Board* v. *Express Publishing Co.*, 111 F. (2d) 588 (C. C. A. 5th), enforcing an order requiring that the employer embody any understanding reached with the union in a signed agreement, if so requested by the union (see 13 N. L. R. B., at 1227).

CONCLUSION

The petition presents no question of general importance, and there is no conflict of decisions. The petition should therefore be denied.

Respectfully submitted.

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OCTOBER TERM, 1940

No. 152

J. GREENEBAUM TANNING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The Government's position (Br. in Opp. 19-21) that the decision below is not an adjudication upon the validity of the "work relief" provision of the Board's order, finds further support in two recent decisions of the court below, the opinions in which were received subsequent to the printing of the brief in opposition. *Stewart Die Casting Corp.* v. *National Labor Relations Board,* decided July 3, 1940; *M. H. Ritzwoller Co.* v. *National Labor Relations Board,* decision upon petition for rehearing, July 16, 1940. In the *Stewart Die Casting* case the company contended that the "work relief" provision was not within the author-

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ity of the Board under the Act;[1] the court discussed the provision at length, concluded that it was not valid, and refused to enforce it. In its discussion the court referred to the conflicting decisions in other circuits upon the question, but did not mention its own decisions in the instant case, in the *M. H. Ritzwoller* case (decided May 8, 1940), or in *National Labor Relations Board* v. *Lightner Publishing Corp.*, decided July 1, 1940, in each of which the "work relief" provision had not been challenged by the company prior to judgment and had been enforced by the court. The court thus strongly indicated that it did not regard any of these decisions as an adjudication upon the question.[2]

In the *M. H. Ritzwoller* case the company filed, prior to the *Stewart Die Casting* decision, a petition for rehearing specifically challenging the "work relief" provision and asserting that the

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[1] Brief for Petitioner, No. 7132, October Term, 1939, Circuit of Appeals for the Seventh Circuit, pp. 67, 72–74.

[2] In the *Stewart Die Casting* case, the court likewise indicated that it did not consider the decisions in *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. (2d) 681 (C. C. A. 1st), and *National Labor Relations Board* v. *Planters Mfg. Co.*, 105 F. (2d) 750 (C. C. A. 4th), as holdings upon the point. It said that in the *Somerset Shoe* case "the provision was approved without discussion and, apparently, without consideration" and that in the *Planters Mfg.* case the same result was reached "also without discussion."

court had erred in enforcing it. We quote the opinion of the court in full:

> On petition for rehearing in the above entitled matter, petitioner raises the question as to the validity of that portion of the Board's order which requires petitioner to pay over "to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work-relief projects." Nothing was said concerning this requirement either in petitioner's original brief or in the Board's brief. It is mentioned, but not argued in petitioner's reply brief. The requirement is shown in a footnote of the Board's order as found in the Transcript of Record. The question, therefore, was not considered or decided.
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> We have recently, in *Stewart Die Casting Corporation* v. *National Labor Relations Board,* decided July 3, 1940, held that the Board is without authority to make such requirement. There is no occasion to repeat or further discuss what we said in that case.
>
> In addition to the modification suggested in our original opinion, the Board's order is further modified in conformity with this additional holding, and as so modified its request for enforcement is allowed.

This demonstration that the court did not in the present case rule upon the validity of the "work

relief" provision, likewise supports our position (Br. in Opp. 13–14) that the other "Objections" to the validity of the Board's order which petitioner first raised after judgment, and then only in connection with the form of the decree, were not considered upon their merits by the court below.

Respectfully submitted.

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